UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

COMMUNICATIONS WORKERS OF AMERICA AND COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4309 (AT&T TELEHOLDINGS, INC., D/B/A AT&T MIDWEST AND THE OHIO BELL TELEPHONE COMPANY-Employer)	
and	CASE NO. 8-CB-10487
SANDA ILIAS, An Individual	

ANSWERING BRIEF TO THE CROSS EXCEPTIONS AND BRIEF OF CHARGING PARTY FILED ON BEHALF OF RESPONDENTS, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC AND COMMUNICATIONS WORKERS OF AMERICA LOCAL 4309

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I. INTRODUCTION

Charging Party has filed one Cross-Exception to the Administrative Law Judge's ("ALJ") decision. Charging Party takes exception to the remedy provided by the ALJ. The ALJ issued the following remedy:

> Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall order that the Respondents rescind their requirement that Beck objectors renew their objection yearly. I shall also order Respondent to notify its existing Beck objectors, in writing, that they are not required to renew their objection yearly, and to notify its members on the change in the next edition of *CWA News* that is mailed to its members. I will further order that Respondents make the Charging Party whole, including interest, for any fees she paid to Respondents for non-representational expenses since she first filed her Beck objections in September 2004 that have not already been refunded to her. (ALJD 13, lns. 19-27)

Charging Party objects to this remedy, seeking to greatly expand its scope to apply on a nationwide basis to all bargaining unit members who submitted at least one Beck objection; who never renewed their annual objection after September, 2004; and who did not receive a dues rebate from CWA. (Charging Party's Cross Exceptions and Brief, p. 1.) Such a massive expansion of the remedy in this case is not at all justified, even assuming *arguendo* that the remainder of the ALJ's decision were to be upheld.[1] Charging Party's request for this massive expansion should be summarily denied.

[1] The Board limited the scope of the remedy in a Beck case in United Food and Commercial Workers Locals 951, 7, and 1036 (Meijer, Inc.), 341 NLRB 1013 (2004). The reasoning and result in that case is applicable herein.

II. ARGUMENT AND LEGAL AUTHORITIES IN OPPOSITION TO CHARGING PARTY'S CROSS EXCEPTION

A. The Remedy Charging Party Seeks is Not Warranted by the Cited Cases.

The entire basis for Charging Party's exception is her view that under Supreme Court precedent CWA allegedly "had no statutory authority to collect and retain the fees from objectors who did not file an annual objection", citing NLRB v. General Motors Corp., 373 U.S. 734 (1963); Pattern Makers v. NLRB, 473 U.S. 95, 102-103 (1985); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); and Communications Workers v. Beck, 487 U.S. 735 (1988). None of the cited cases stand for the proposition that a Union's practice of seeking annual renewals from Beck objectors violates the Act. Abood did not even involve the Act. The other cited cases did involve the Act and addressed various issues related to the general subject matter of Beck objectors. However, none dealt with the specific issue at hand, i.e. annual renewals of Beck objections.

Neither the Supreme Court nor the Board have ever conclusively resolved the current issue. The fact that this issue has never been resolved by the Board is well understood by General Counsel, if not the Charging Party. (See General Counsel's Answering Brief, labeled "Reply Brief", at p. 8.) The underlying premise behind Charging Party's argument simply is not supported by the cited case law. The greatly expanded remedy sought by Charging Party is simply not justified in this case.

B. The Law on the Specific Question at Issue in this Case is at Best Unclear.

As noted in Respondents' Exceptions and Brief in Support a Union does not act arbitrarily in breach of its duty of fair representation when it reasonably believes it is acting in a manner that is not inconsistent with the Board's pronouncements on the subject. In fact, when the Board law in question is "unsettled" or "ambiguous" it is not arbitrary for a Union to act in a

manner that is consistent with what it reasonably believes to be Board law. National Association of Letter Carriers, 347 NLRB No. 27 (2006), slip opinion, pp. 1-2; citing Government Employees, Local 888, 323 NLRB 717, 721-722 (1997); and Electrical Workers IUE Local 444 v. NLRB, 41 F.3d 1532, 1534 (D.C. Cir. 1994). Board law was and remains at best, unsettled or ambiguous on the subject of annual renewals for Beck objectors. Based on the factual and legal landscape facing CWA, it was certainly reasonable for it to conclude that its annual renewal practice was not unlawful.

That reasonable belief was reinforced by the decisions in three (3) cases to which CWA was a party. In all three (3) cases CWA's annual renewal practice was challenged, litigated, and upheld. Abrams v. Communications Workers of America, 59 F.3d 1373 (D.C. Cir. 1995); White v. Communications Workers of America, 370 F.3d 346 (3rd Cir. 2004); and Communications Workers Local 9403 (Pacific Bell), 322 NLRB 142 (1996), affirmed in Finerty v. NLRB, 113 F.3d 1288 (D.C. Cir. 1997). Prior to the ALJ's decision in this case, CWA had not been a party to any case where a contrary determination was made.

There were also at least two (2) other reported cases known to CWA to which it was not a party, where the Courts upheld similar annual renewal practices by other Unions. See e.g. Tierny v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987); Kidwell v. Transportation Communications Int'l Union, 731 F. Supp. 192 (D. Md. 1990), aff'd in part and rev'd in part on other grounds, 946 F.2d 283 (4th Cir. 1991), cert. denied, 503 U.S. 1005 (1992). Both of these cases hold that for a Union to maintain an annual renewal policy for Beck objectors is not unlawful.[2]

[2] This is not to say that some cases have not held otherwise. Those cases taking a different view were discussed and distinguished in Respondents' Exceptions and Brief in Support, at pp. 22-28. In the interest of brevity, that discussion is simply incorporated by reference herein.

In addition, beginning in 1988, shortly after Beck was handed down, the Office of General Counsel issued its first formal Memorandum on the procedures Unions must follow to comply with Beck. In this Memorandum the General Counsel specifically approved annual renewals. (G.C. 88-14 at p. 3.)

This policy was reiterated in 1992, when General Counsel again issued a formal Memorandum on this subject. It continued to recognize that Unions may lawfully require employees to renew their objection annually, and may establish "window periods" for filing such objections. (G.C. 92-5, at p. 4.) Finally, the most recent substantive Memorandum on this subject was issued in 2001 by the Office of the General Counsel. Once again, Union annual renewal policies were approved. (G.C. 01-04, at p. 3.)

The law was, and still is, at best unclear on the underlying subject at issue in this case. It could easily be argued that the legal environment on this subject under which the CWA was operating, overwhelmingly supported CWA's position that its annual renewal practice was lawful. At best, though, the law on this specific subject was unclear. Even General Counsel seems to recognize the lack of clarity in the law. Its Answering Brief (labeled Reply Brief) simply recites the differing interpretations of the law on this specific subject and asks the Board to simply "consider the competing arguments". General Counsel does not take a position on which approach is the most appropriate.

In this environment, to enlarge the remedy awarded to such a great degree as sought by Charging Party, would be tantamount to imposing a punitive measure upon the Union for simply complying with the law as best it understood it.[3] This good faith reliance on the existing legal

[3] Aside from the potentially significant amount of dollars that could be included in the vastly expanded remedy sought by the Charging Party, CWA would also be forced to devote a great deal of administrative resources to sort out the myriad questions that would arise in terms of who was due a refund and in what amount.

landscape should provide no basis for imposition of the punitive measures now being sought by Charging Party.

C. As it is, the ALJ's Remedy Went Beyond that Which General Counsel Sought in its Amended Complaint.

In its original Complaint, General Counsel sought an order requiring Respondents to reimburse the Charging Party, and only the Charging Party, that portion of her dues paid in the past that was attributed to non-representational expenditures. General Counsel sought this monetary make whole remedy for the six (6) month period prior to the filing of the charge in this case until the present time (i.e. from six (6) months prior to January 17, 2006 until the present time). (Exhibit 1 (e) of the formal documents, at p. 4) General Counsel subsequently filed an amended complaint. In its amended complaint it removed any request for monetary relief even for Charging Party, let alone for any claimed nationwide group of unnamed objectors. (Exhibit 1 (h) of the formal documents, at p. 4) Removing this request for monetary relief was the only substantive change in the language of the amended complaint from what had been the language in the original complaint. This change represented the considered judgment of General Counsel that even if Respondents were ultimately deemed to have violated the Act, a monetary remedy, even one limited soley to the Charging Party, was simply not justified.

Nor was any evidence presented at the hearing that would have allowed the ALJ to have rendered factual determinations about any objectors besides the Charging Party. There certainly was no evidence whatsoever introduced as to any burden that might have been imposed upon any objector other than the Charging Party, by the Union's challenged practice. The evidence introduced concerning the burden imposed on the Charging Party, herself, was personal to her as well as rather incredulous. (TR 24, ln. 15 - TR 25, ln. 3; TR 45, ln. 10 – TR 46, ln. 18) This evidence is simply not transferable to the many other objectors who would be encompassed by

the greatly expanded remedy sought by the Charging Party. Thus, there is no basis to assess the burden that has been imposed on the Charging Party's proposed nationwide group of objectors by CWA's challenged practice. Yet that very assessment was one of the two (2) key issues committed to the ALJ for resolution. (ALJD 11, lns. 28-33)[4]

Without specific comment and perhaps without even being aware of this change in General Counsel's pleadings, the ALJ ordered Respondents to make Charging Party whole in a monetary sense. In so doing the ALJ went beyond what General Counsel sought. In any event, the ALJ did not believe this case warranted a monetary make whole remedy with the broad based nationwide reach now sought by Charging Party.[5] There is no basis for overturning that judgment in this case.

Charging Party has offered nothing to support such a broad remedy, other than her misreading and/or misrepresentation of Supreme Court precedent on this subject. Given this record, even assuming *arguendo* that the Board were to uphold the ALJ's decision, the massive expansion of the remedy he recommended, now being sought by the Charging Party, is wholly without justification and should be summarily denied.

D. <u>Any Relief Ordered Should Be Prospective Only.</u>

Assuming *arguendo* that the Board were to determine that CWA's annual renewal practice was unlawful, any remedy ordered should be prospective only. In <u>Chevron v. Huson</u>, 404 U.S. 97 (1971) the Supreme Court identified the three (3) factors which call for application of its non retroactivity doctrine:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., <u>Hanover Shoe v. United Shoe Machinery Corp.</u>, 392 U.S. 481, at 496,

[4] As noted in Respondents Exceptions and Brief in Support, the ALJ did not even make that assessment with respect to the Charging Party herself.

[5] The Charging Party did seek such relief in her Brief to the ALJ, p. 15. The ALJ rejected it *sub silento.*

> (1968) or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, 393 U.S. 544, at 572 (1969). Second, it has been stressed that "we must…weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, 381 U.S. 618, at 629 (1965). Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, 395 U.S. 701, at 706 (1969). Chevron v. Huson, *supra*, at 106-107.

In Chevron, the Supreme Court applied these factors to conclude that retroactive application of the rule of law in question would not be appropriate. A similar analysis is applicable in this case. Given the Chevron approach it would be wholly inappropriate to require Respondent to provide for the type of retroactive broad based, nationwide, make whole monetary relief of the type now sought by Charging Party.

CONCLUSION

Charging Party's exception is not well taken. Her request for nationwide retroactive make whole remedy is thoroughly unwarranted and should be summarily denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 27th day of March 2009, the Respondents' Answering Brief to the Cross Exceptions filed by Charging Party was electronically filed at the e-filing section of the Board's website. Counsel for the other parties to this proceeding listed below were notified via telephone that this document was being filed electronically and arrangements were made to timely transmit a copy of Respondents' Exceptions and Brief in Support by the means preferred by said counsel in compliance with § 102.114 (i) of the Board's Rules and Regulations. In addition to the e-filing, Respondents on this same day sent eight (8) hard copies of Respondents' Exceptions and Brief to the Board via regular U.S. mail.

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